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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 202

PAN AMERICAN AIRWAYS, INC. and NATIONAL SURETY CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Jurisdiction	1
Summary Statement of Matter Involved	1
The Questions Presented	4
Reasons Relied on for the Allowance of the Writ	4
BRIEF IN SUPPORT OF PETITION	
Opinions Below	7
Statement of the Case	7
Specification of Errors	8
Statutes and Regulations	8
Summary of Argument	12
Argument:	
I. Section 9 of the Immigration Act of 1903 does not apply of its own force to air transportation	13
(a) The expressed intent of Section 7 of the Air Commerce Act of 1926 is that the immigration laws, even if by their terms applicable to air transportation, shall apply only if and to the extent determined by regulations of the Secretary of Labor	13
(b) Section 9 of the Immigration Act of 1903 is not by its terms fairly applicable to the present case	15
II. Since liability arises solely from the regulation made by the Secretary of Labor under the provisions of Section 7 of the Air Commerce Act, the maximum penalty of $500 provided in Section 11(b) of that Act applies	20

Table of Cases

PAGE

Alexander v. *Alexandria*, 9 U. S. (5 Cranch) 1 14

Great Northern Ry. Co. v. *United States*, 315 U. S. 262 14

McBoyle v. *United States*, 283 U. S. 25 ..... 15, 19

Swigart v. *Baker*, 229 U. S. 187 14

United States v. *Hunter*, 80 F. (2d) 968 (C. C. A. 5th) 18

Statutes

Air Commerce Act of 1926:

Section 7 (Act of May 20, 1926, c. 344, §7, 44 Stat. 572, 49 U. S. C. A. §177) 2, 3, 4, 5, 7, 9, 12, 13, 15, 20, 21, 22

Section 11(b) (Act of May 20, 1926, c. 344, §11(b), 44 Stat. 574) 2, 3, 4, 5, 8, 11, 13, 20, 21, 22

Section 9 of the Immigration Act of 1903, as amended (Acts of March 3, 1903, c. 1012, §9, 32 Stat. 1215; Feb. 5, 1917, c. 29, §9, 39 Stat. 880; May 26, 1924, c. 190, §26, 43 Stat. 166; 8 U. S. C. A. §145) 2, 3, 4, 5, 7, 8, 12, 13, 15, 16, 17, 18, 19, 21

Sections 16 and 17 of the Immigration Act of 1924 (Act of May 26, 1924, c. 190, §§16 and 17, 43 Stat. 163, 8 U. S. C. A. §§216 and 217) 18

Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. §347(a)) 1

Rules and Regulations

Immigration Laws and Rules of January 1, 1930:

Rule 5A2 ..... 7, 11, 14, 19, 21

Rule 5G1 ..... 12, 21

1941 Supplement to Code of Federal Regulations of the United States, Title 19 Customs Duties, §410(b) 21

Code of Federal Regulations of the United States, Title 14 Civil Aviation, §§94.17 and 94.20 21

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PAN AMERICAN AIRWAYS, INC. and NATIONAL SURETY CORPORATION, Petitioners, v. UNITED STATES OF AMERICA, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pan American Airways, Inc. and National Surety Corporation pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that Court rendered in the above cause on April 29, 1943 (R. 45).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347(a)).

Summary Statement of Matter Involved

This case requires determination of the source and extent of the liability of air carriers for the unlawful transportation of aliens into the United States.

Petitioners contend that this liability arises solely from the provisions of Section 7(d)(3) of the Air Commerce Act of 1926, 49 U. S. C. A. § 177(d)(3), authorizing the Secretary of Labor to provide by regulation for the application to civil air navigation of the laws and regulations relating to immigration, and that the liability is limited to the civil penalty of $500 provided under Section 11(b) of that Act, 49 U. S. C. A. § 181(b).

The District Court (R. 21) agreed that liability arose solely from regulations made by the Secretary of Labor under Section 7(d)(3) of the Air Commerce Act of 1926 but held that where the Secretary had made applicable an immigration law which provided a penalty of more than $500, the higher penalty might be enforced, in spite of the provisions of Section 11(b).

The majority of the Circuit Court of Appeals (R. 37) held that liability arose under Section 9 of the Immigration Act of 1903, which was considered to apply of its own force, that the penalty of $1,000 provided in that section was therefore applicable, and that it was unnecessary to consider Section 11(b) of the Air Commerce Act.

Judge Hutcheson wrote a dissenting opinion (R. 40) sustaining the position of the petitioners.

Section 9 of the Immigration Act of 1903, 8 U. S. C. A. §145, provides that "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States" aliens afflicted with certain diseases or mental defects.

Before any occasion had arisen for determining whether Section 9 of the Immigration Act of 1903 applied to aircraft, Congress enacted the Air Commerce Act of 1926. Section 7 of that Act, 49 U. S. C. A. §177, is entitled "Appli-

cation of Existing Laws Relating to Foreign Commerce." Section 7 provides that the navigation and shipping laws, including any definition of the words "vessel" or "vehicle" found therein, shall not be construed to apply to aircraft, and authorizes the Secretary of the Treasury, the Secretary of Commerce and the Secretary of Labor "by regulation to provide for the application to civil air navigation of the laws and regulations" relating to customs and public health, entry and clearance of vessels, and immigration, respectively. Section 11(b) of the Act, 49 U. S. C. A. §181(b), provides a uniform maximum penalty of $500, *which may be remitted or mitigated,* for violation of any regulation made under the terms of Section 7.

Pursuant to the authority thus conferred, the respective Secretaries have promulgated regulations making applicable various of the statutes relating to customs and public health, entry and clearance, and immigration. The regulations issued by the Secretaries of the Treasury and of Commerce impose the penalty of $500 provided for in Section 11(b). However, the regulation issued by the Secretary of Labor provides that the penalty shall be $500 except when a different penalty is provided under the statute which is made applicable by the regulations.

The District Court (R. 21) sustained this regulation, holding that the penalty prescribed by Section 11(b) does not apply to a regulation making applicable to aircraft a law of Congress carrying its own penalty. The majority of the Circuit Court of Appeals held that Section 9 of the Immigration Act of 1903 applied to aircraft of its own force, and that it was therefore unnecessary to consider the applicability of the uniform maximum penalty provision of Section 11(b) of the Air Commerce Act of 1926.

Petitioners contend that the Circuit Court of Appeals erred in holding that Section 9 of the Immigration Act of

1903 applies to air transportation of its own force; and that the District Court, while correctly holding that liability in the case of aircraft arises solely by virtue of a regulation issued under Section 7(d)(3) of the Air Commerce Act of 1926, failed to give proper effect to Section 11(b) of that Act which prescribes a uniform maximum penalty of $500 subject to remission or mitigation.

The Questions Presented

1. Does the liability of an air carrier for unlawfully transporting aliens into the United States, as held by the District Court and Judge Hutcheson, arise solely from regulations made by the Secretary of Labor under Section 7(d) of the Air Commerce Act of 1926, authorizing the Secretary "by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws," or, as held by the majority of the Circuit Court of Appeals, does such liability arise under Section 9 of the Immigration Act of 1903 of its own force?

2. If the District Court and Judge Hutcheson were correct in concluding that the liability of an air carrier for unlawfully transporting aliens into the United States arises solely from regulations made by the Secretary of Labor under Section 7(d)(3) of the Air Commerce Act, is the penalty not limited to $500, as held by Judge Hutcheson, by Section 11(b) of that Act?

Reasons Relied on for the Allowance of the Writ

While the point directly involved in this case is narrow, it is one which is constantly arising and which, in the absence of authoritative determination here, will arise even more

frequently with the ever-growing importance of aircraft as carriers of passengers into the United States.

The question is not simply whether the petitioners should pay a fine of $1,000 or the uniform maximum penalty of $500 provided in Section 11(b) of the Air Commerce Act. The latter penalty is subject to mitigation or remission by administrative action which may take account of the peculiar problems of air transportation, whereas the $1,000 penalty under Section 9 of the Immigration Act of 1903 is inflexible. However, as a result of the decision of the Circuit Court of Appeals, the case presents a far broader question than that. It raises the general question whether all the various laws relating to immigration, customs and public health, and entry and clearance of vessels which were enacted from time to time over a period of years in connection with surface transportation, are to be applied to aircraft if, under a literal construction, they can be interpreted to include air transportation as well—in spite of the declaration by Congress, in Section 7 of the Air Commerce Act, that those laws should be made applicable to air commerce only to such extent and upon such conditions as the respective Secretaries of the Treasury, Commerce and Labor should deem advisable.

The effect of the decision of the Circuit Court of Appeals is to frustrate the evident intent of Congress and require the application to air transportation of general laws relating to immigration, customs and public health, and entry and clearance, without administrative consideration or determination whether they are necessary and workable in the case of aircraft.

It is submitted, therefore, that the case involves an important question of Federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the above case, and that said judgment be reversed.

HENRY J. FRIENDLY,
Counsel for Petitioners.